



**Gichuru v Attorney General (Civil Application 23 of 2020)  
[2024] KECA 473 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KECA 473 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION 23 OF 2020  
F SICHALE, FA OCHIENG & LA ACHODE, JJA  
MAY 9, 2024**

**BETWEEN**

**JANE NJOKI GICHURU ..... APPLICANT**

**AND**

**THE HON. ATTORNEY GENERAL ..... RESPONDENT**

*(An application for leave to introduce additional evidence in the intended appeal against the High court judgment of Mulwa J dated 20th April 2017) in Nakuru HCC No.94 of 2010)*

**RULING**

1. Jane Njoki Gichuru, the applicant herein, has brought a Motion dated 17<sup>th</sup> July 2020, under Rule 29 (1) (b) of the *Court of Appeal Rules* 2010 against the respondent, the Hon. Attorney General.
2. The application seeks for a substantive order that:

“This Honourable Court be pleased to grant Leave to the Applicant to adduce additional evidence; being the findings and recommendations of the Preliminary Inquiry Committee of the Kenya Medical Practitioners and Dentists Board in P.I.C Case NO. 77 of 2009, for consideration during the hearing and determination of the Applicant's appeal against the Judgment and Decree of Hon. Justice J. Mulwa delivered on 20th April, 2017 in Nakuru HCC No. 94 of 2010.”
3. The application is premised on the grounds on its face and supported by the affidavit of even date sworn by the applicant.
4. The application is founded on grounds that earlier on, the applicant lodged a complaint before the Medical Practitioners and Dentists Board (hereinafter the Board). A determination was made in the application on the 30<sup>th</sup> October 2013 without notice to the applicant. Although, the proceedings of the Board were brought to the attention of the court during trial, the evidence was not produced in



court. The applicant blamed this oversight on her former counsel, who ought to have followed the case, advised her accordingly and taken the necessary steps.

5. The applicant deposes that she was not aware of the response of the Board until 7<sup>th</sup> March 2019, although the disposition of the case was on 20<sup>th</sup> April 2017. She states that if the determination of the Board is considered as evidence by this Honourable Court, it will undoubtedly have a great impact upon the decision to be arrived at as well as the issues for determination.
6. The applicant avers that the findings were quite credible having been made by a professional body, the committee of inquiry, and since the said determination and recommendations are concise, it shall not be difficult or impossible for the respondent to respond effectively. It is urged that the effect of the Board's findings, if considered, shall not be to fill gaps in the evidence, but rather to remove any vague areas or doubt over the suit and shall have a direct bearing on the main issue for determination. She prays that the court will consider these grounds and not allow the applicant to suffer an injustice, because of the ineffective assistance of counsel, and failure of the trial court to take Judicial Notice of, or call for the said findings.
7. The backdrop of this application is a plaint dated 13<sup>th</sup> April 2010 that the applicant filed against the respondent, on behalf of the Ministry of Health, Rift Valley Hospital (Nakuru). In the plaint the applicant alleged negligence on the part of the respondent's doctors, nurses and other staff. She averred that she was diagnosed with tubal blockage and was admitted in the mentioned hospital for tuboplasty. That the surgery was negligently conducted on 15<sup>th</sup> April 2009 and as a result, she suffered serious complications, pain, and suffering.  
Accordingly, she sought for damages to the tune of Kshs. 1,832,000/-.
8. In opposition, the respondent denied that the surgery was conducted negligently.
9. Upon considering the matter before her, Mulwa J dismissed the suit. Aggrieved by the said decision the applicant filed the appeal subject of this application.
10. On 13<sup>th</sup> February 2023, a Hearing Notice was sent from the registry to both parties in the suit via email, indicating that the hearing of the present application would be on 8<sup>th</sup> March 2023. The applicant was directed to serve the respondent with the application; the respondent to respond to it within two days of receipt and the applicant to file and serves reply, if any, within two days. Further, the parties were directed to file and serve their written submissions within three days of the close of the pleadings.
11. The applicant did file written submissions dated 17<sup>th</sup> February 2023, through the firm of Kiplenge & Kurgat Advocates. We note however, that although served with the application as directed, the respondent did not file any response, and/or written submissions in response, nor appear in the virtual hearing on the appointed date.
12. The applicant's submissions reiterated what she had averred in her supporting affidavit and asserted that the document that she seeks to introduce in evidence, was not available to her until 7<sup>th</sup> March 2019, two years after the delivery of the impugned judgment. She attributes this lapse to her former advocate and urges that the mistake of her then advocate should not be visited upon her.
13. Placing reliance on the decision of *Mohamed Abdi Mahamud - v- Ahmed Abdullabi Mohamad & 3 others* [2018] eKLR, the applicant urges that it is evident that the document sought to be introduced will not prejudice the respondent's right to a fair hearing, as the respondent was aware of the proceedings that yielded the said document. It is argued that the evidence sought to be added is needful, succinct, relevant, and credible, having originated from an inquiry conducted by a professional



body. That it will assist the court to achieve the overriding objective to arrive at a just and conclusive determination.

14. We have considered the application, the supporting affidavit, and the submissions on record. The only issue that falls for our consideration is whether this application has met the threshold for allowing new evidence in this Court. On this we are guided by Rule 29 (1) (b) of the [Rules of this Court](#) which provides that:

“On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power—

(a) .....

(b) in its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.”

15. The principles for adduction of new evidence on appeal were set out in *Tarmohamed & another v Lakhani & co* (1958) EA 567, where the Court of Appeal in adopting the Judgment of Lord Denning in *Ladd v Marshall* (1954)1 WLR, 1489, stated as follows:

“Except in cases where the application for additional evidence is based on fraud or surprise: “to justify reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that , if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”

16. The applicant deposes that the evidence that she seeks to add was not at her disposal during trial. She avers that this was an oversight on the part of her former advocate, a mistake which should not be visited upon her. Also, that if the addition of the said evidence is allowed, it will have an important influence on the outcome of the case and that the evidence is from the Medical Practitioners and Dentists Board, which is a credible source.

17. We note that the evidence sought to be added in the appeal is dated 30<sup>th</sup> October 2013. This means that the evidence in issue was available before the trial in the High Court was concluded. It is averred that the oversight was on the part of the applicant’s former advocate who failed to follow up during the proceedings of the Board. That the applicant only became aware of the findings of the Board application on the 7th of March 2019, about two years after the impugned judgement was delivered. This Court had occasion to deal with such a scenario in the case of [Safe Cargo Limited V Embakasi Properties Limited & 2 Others](#) [2019] eKLR where held as follows:

“We have considered whether the proposed additional evidence could have been discovered after due diligence. The core additional evidence sought to be produced include Part Development Plan dated 26th November 1987 and affidavits and statements filed in ELC Case No. 233 of 2009. The Part Development Plan is a public document that the applicant, with due diligence could have obtained.”

18. In the present application it is evident that the applicant lodged the complaint with the board, as such she was aware of the proceedings at the Board. It behoved her to follow or enquire after the progress of proceedings in her claim. In our view, had the applicant exercised due diligence, she would have



obtained the report of the outcome of the proceedings within a reasonable time and adduced it in evidence in the trial court.

19. Ultimately, this application is found to lack merit and is hereby dismissed with no orders as to costs. The applicant is ordered to set the main appeal for hearing.

**DELIVERED AND DATED IN NAKURU THIS 9<sup>TH</sup> DAY OF MAY, 2024**

**F. SICHALE**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

I certify that this is

a true copy of the original

Signed

**DEPUTY REGISTRAR**

